No. 18,257

IN THE

United States Court of Appeals

For the Ninth Circuit

RAYTHEON COMPANY, a corporation,
Appellant and Cross-appellee,
vs.
RHEEM MANUFACTURING COMPANY, a corporation, and RHEEM SEMICONDUCTOR CORPORATION, a corporation,
Appellees and Cross-appellants.

OPENING BRIEF FOR APPELLANT, RAYTHEON COMPANY

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JURISDICTION

This is an action brought in the United States District Court for the Northern District of California, Southern Division, by a Delaware corporation having its principal place of business in Massachusetts against two California corporations, one having its principal place of business in New York, the other having its principal place of business in Californa. The complaint prayed for a temporary restraining order, an injunction and declaratory relief. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

The District Court had jurisdiction under sections 1332 and 2201 of Title 28 of the United States Code. On this appeal from the judgment below, this Court has jurisdiction under sections 1291 and 1294(1) of Title 28 of the United States Code.

STATEMENT OF THE CASE

a. Summary Statement

In 1961, Rheem Semiconductor Corporation (hereinafter called "Semiconductor"), a subsidiary of Rheem Manufacturing Company, a diversified manufacturing corporation ("Rheem"), was in the business of manufacturing semiconductors (transistors and diodes widely used in modern electronic equipment and computers). Rheem decided to discontinue the business of manufacturing semiconductors. On November 1, 1961, Raytheon Company ("Raytheon") and Semiconductor entered into an agreement (the "basic contract") (Tr. 10-90) whereby Semiconductor sold to Raytheon the leasehold improvements, the existing inventory, and a designated part of the manufacturing equipment known between the parties as "List A," and agreed to enter into a lease to Raytheon of most of the remaining manufacturing equipment, known between the parties as "List B." Rheem, the parent, endorsed on the document its own approval of the terms and consideration and agreed to take all necessary and appropriate action to insure compliance by its subsidiary (Tr. 45).

On November 30, 1961, Semiconductor and Raytheon entered into the agreed lease of the "List B" items for

six months until June 1, 1962 (Tr. 53-60). The lease provided that if, during the first 90 days of the term (i.e., until March 1, 1962) Semiconductor should have received a bona fide offer for any of the leased property, Raytheon should have the right within five days after notice thereof to buy that property at the price specified in the offer; otherwise Semiconductor could sell that property to the offeror at the offered price, subject to the remaining term of the lease (text infra, pp. 7-9). After the 90-day period, Semiconductor could sell any of the remaining property to anyone at any time, subject to the remaining term of the lease. On or before May 15, 1962, Raytheon by written notice could elect to buy any of the leased property not previously sold at a price determined either by mutual agreement, or, failing agreement, a price equal to the lower of (1) 90 per cent of the book value of such property or (2) the value as appraised by the American Appraisal Company for the purposes of determining a fair market value of the property. All rents paid under the lease were to be credited against and applied toward the purchase price of the items purchased by Raytheon (text infra, pp. 7-9).

Within the 90-day period, Semiconductor notified Raytheon that it had received an offer, not from an outsider, but from its parent, Rheem, to purchase most of the items on List B (Tr. 106-107). Raytheon notified Semiconductor that it unconditionally exercised its right under the contract to purchase the equipment embraced within the "offer"; that the price should be determined as required by the contract; and that it did not deem the offer a bona fide one (Tr. 112-113). Raytheon gave further notice that

it exercised its right to buy additional "B" list items (which had not been included in the parent-subsidiary offer) pursuant to the contract (Exhs. D and E).

Raytheon then brought this action (Tr. 1) alleging that the parent-subsidiary offer was not bona fide, but was merely an effort by the parent and subsidiary to set prices for the assets in question in such a manner as to frustrate the method of price determination provided for in the contract. The complaint prayed for a temporary restraining order and injunction against the sale from subsidiary to parent and for a judgment declaring the rights of the parties.

The temporary restraining order was granted (Tr. 119). On hearing the merits, the court below held: (1) that the parent-to-subsidiary offer was bona fide; (2) that Raytheon had unconditionally exercised its right of first refusal to buy the items embraced within the offer; (3) that the price at which it thus became bound to buy the assets was the price named in the parent-subsidiary offer; and (4) that the price ("fair market value") at which Raytheon was entitled to buy the remaining "B" list items was their value *to Raytheon, in place* as operating equipment, rather than their value demounted and on the loading dock ready for shipment to a buyer on the general market (Judgment, Tr. 165-168).

Raytheon appealed from all parts of the judgment except that which decreed that it had exercised its right to purchase the assets embraced in the offer (Tr. 169-170). Rheem and Semiconductor have appealed from that part of the judgment which holds that Raytheon exercised its right of first refusal (Tr. 171).

b. The Facts

In and just prior to 1960, Semiconductor was engaged in the manufacture of electronic semiconductor devices at a plant in Mountain View, California. Semiconductor was then owned 60 per cent by Rheem and 40 per cent by a group of scientist-employees known as the "Baldwin group" who were the technical "brains" of the Company (R.Tr. 83). The industry was not in prosperous condition; it was in the throes of "very depressed pricing and intense competition" (R.Tr. 543). Semiconductor's operation was attended by heavy losses; in 1961, it was losing some $300,000 a month (R.Tr. 123). There was some thought of saving the situation by entering into a joint venture with some other concern (R.Tr. 211-212); the Rheem people also let it be known that they were considering going out of the business entirely, and that a sale of the Semiconductor assets was in contemplation.

Meanwhile Raytheon, with semiconductor operations of its own in two Eastern cities (R.Tr. 61), had approached Rheem regarding a possible reciprocal trade branding agreement (R.Tr. 240-241). Discussions between the companies briefly touched upon the possibility of a joint venture, or in the alternative, acquisition by Raytheon of the stock of Semiconductor (R.Tr. 62-63, 241-242). The discussions finally centered upon Raytheon's acquisition of some or all of the assets of Semiconductor's Mountain View plant (R.Tr. 63, 243). On this basis, in September and October, 1961, the negotiations reached their final shape.

The chief negotiators on the Rheem side were a vice president and director of Rheem who was also treasurer

of Semiconductor, and Rheem's treasurer, who had no office in Semiconductor (R.Tr. 513, 531).

To eliminate the complication of the "Baldwin group" minority interest, Rheem agreed to buy up their interest and did so, resulting in Rheem's ownership of 99.9 per cent of Semiconductor (R.Tr. 84).

Another immediate problem was that of determining which items of manufacturing equipment would be of value to Raytheon if the latter should take over the operations at Mountain View (R.Tr. 141). Faced on the one hand with literally thousands of items of equipment of undetermined value, and for which no readily understandable descriptive list was available,[1] and on the other hand with the desire to consummate the transaction without undue delay, the parties worked out a plan for solving the problem. The plan involved the division of Semiconductor's manufacturing equipment into three groups of items, which have become known to the parties as the "A," "B," and "C" lists. The "A" list was intended to comprise the items which were specially adapted for use in the Mountain View operation, and for which Raytheon would be willing to pay 90 per cent of book value (R.Tr. 96-97, 125-126). The "B" list would primarily contain unspecialized items of doubtful or unknown utility (R.Tr. 98, 100, 125-126). The "C" list consisted of items to be excluded from the transfer (R.Tr. 461).

On this basis the parties, as of November 1, 1961, executed the "basic contract" (Tr. 10-90). Thereby Raythec

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[1]The only inventory was an IBM list with sometimes cryptic abbreviations (e.g., Exh. C). It created acute problems with regard to defining the "A" list and "B" list, infra.

bought the leasehold improvements and the "A" list of manufacturing equipment items for $923,800 (Tr. 11), and the inventory of finished and unfinished products for $1,100,000 (Tr. 19). Section 2(a) of the basic contract provided for the making of a lease to Raytheon of the "B" list items (Tr. 12). The form of the lease, verbatim, was incorporated in the basic contract as Exhibit B thereto (Tr. 53-60). Section 2(b) of the basic contract gave Raytheon the right to return any of the "A" list items and substitute "B" list items of an equal or greater book value subject to payment of 90 per cent of book value for any increase (Tr. 12).

The lease of the "B" list items (Tr. 53-60) contains the language in controversy. Basically, Semiconductor leased the items to Raytheon for six months from December 1, 1961, to June 1, 1962, for the total sum of $250,000, payable in equal monthly installments on the first of each month (Tr. 53). At the expiration or termination of the lease, Raytheon was required to deliver all of the leased property which it should not theretofore have purchased, to Semiconductor at the loading docks of the Mountain View plant, packed for shipment if Semiconductor should so request (Tr. 54).

Section 12 of the lease contains the key provisions so far as this case is concerned:

> "12. *Right of First Refusal:* In the event that, during the first ninety (90) days after the commencement of the term of this Lease, Lessor shall have received a bona fide offer for any item or items of the Leased Property, Lessee shall have the right within five (5) business days from the date on which notice of such offer (specifying the price or prices

offered) is communicated to Lessee at its Mountain View plant facility to purchase from Lessor such item or items of the Leased Property at the price or prices, as the case may be, specified in such offer. In the event Lessee exercises such right, the item or items of Leased Property shall be conveyed to Lessee by Lessor. In the event that Lessee does not exercise such right within such five (5) business days or indicates its desire not to so exercise, Lessor shall have the right to sell, subject to the remaining term of this Lease, such item or items to the party making such offer at the price or prices, as the case may be, offered by such party as set forth in said notice.

After the expiration of said ninety (90) days Lessor shall have the right, subject to the remaining term of this Lease, to sell all or any part of the Leased Property to any party or parties at any time or times and at such price or prices as it shall deem advisable and shall notify Lessee of any such sale.

On or prior to May 15, 1962, Lessee may elect by written notice specifying the item or items to purchase any one or more items of the Leased Property not previously sold or for which Lessor has not accepted a previous offer at a purchase price for each such item of property determined as follows:

(a) In the event of mutual agreement between the parties, the price mutually agreed;

(b) In the event of failure of mutual agreement the price equal to the lower of 90% of the book value of such item of property as shown on Lessor's book of account as of June 30, 1961, determined from the original cost of such property as shown on Schedule 1 attached and depreciated to said June 30, 1961, or the value of such item of property as determined by appraisal for the purposes of determining a fai

market value of the property by an authorized employee or agent of the American Appraisal Company.

All rents paid or to be paid hereunder shall be credited against and applied toward the purchase price of such items purchased by Lessee.

Raytheon further agrees to make a separate written offer on May 15, 1962 to buy all then remaining Leased Property at whatever price Raytheon shall in its sole discretion elect and without obligation under the appraisal procedure outlined above, or to purchase the property if such offer is not accepted. Rheem may, but shall not be obliged to accept such offer. Rheem may accept such offer by written acceptance to Raytheon on or before May 25, 1962.

Payment of so much of the purchase price for items purchased (whether purchased pursuant to the right of first refusal set forth above or the rights to purchase contained in the preceding paragraph) as exceeds rental then paid shall be made in cash or by certified check within fifteen (15) days following agreement upon or determination of the purchase price and any payment of any such excess shall be deemed to be advance payment *pro tanto* of rents thereafter fully due'' (Tr. 57-58).

Under the signatures of Semiconductor and Raytheon o the basic contract, Rheem, the parent, executed the ollowing agreement:

''The undersigned, Rheem Manufacturing Company, hereby approves the principal terms of the transactions described in the foregoing Agreement and the nature and amount of the consideration to be received by Rheem Semiconductor Corporation and hereby agrees to take whatever action shall be necessary or appropriate for the undersigned to take in order that

the Closing thereunder shall be completed and in order that Rheem Semiconductor Corporation shall comply with the provisions of this Agreement'' (Tr. 45).

Raytheon took over the operation following the closing of the basic contract; i.e., on November 1, 1961 (Tr. 42, R.Tr. 114). With the acquisition of first-hand knowledge of what the ''A'' list items actually were, Raytheon exercised its right to make substitutions from the ''B'' list, and in fact exchanged about 30 per cent of the items (R.Tr. 159).[2]

During the week of January 8, 1962, E. N. Kather, a Raytheon vice president, was at the scene of the new Raytheon operation in Mountain View and arranged a luncheon meeting on January 12th with one Oesterle, an accountant of Rheem who was on temporary assignment to Semiconductor, in charge of the transition from Semiconductor to Raytheon (R.Tr. 145-146, 149, 175). Through Oesterle, Kather had previously negotiated the purchase of other items of Semiconductor equipment (R.Tr. 146-147). Just before the scheduled meeting, Robert Stroup, treasurer of Rheem, telephoned to Kather to the effect that he had heard Kather was going to talk to Oesterle that day, and said that Kather should not discuss a price for the ''B'' list unless he was willing to waive Raytheon's

[2]As said above, the only available inventory was a somewhat cryptic IBM list of several thousand items (R.Tr. 68). Problems of identification (errors appeared in at least 10 per cent of the 4000 items (R.Tr. 165), and some items never were found—R.Tr. 145) and of valuation (Raytheon discovered book valuations far exceeding replacement cost new—R.Tr. 186-187) seriously hampered the task of arriving at a definitive list of items to be included in the "A" list.

right to a price determination by appraisal. Kather refused the waiver. Stroup then said it was all right for Kather to go ahead and talk to Oesterle, but that the conversation had to be considered as unofficial. He also said that Rheem was about to make an offer for the equipment (R.Tr. 153-156).[3]

The luncheon took place. Kather suggested a price of $350,000 for the "B" list. After some talk, Kather expressed the thought that Raytheon could go as high as $385,000 (R.Tr. 150-151).

On that same day, January 12, 1962, *Rheem* employees communicated with James Ellison, a used machinery dealer, and requested that he furnish them with an appraisal of the "fair market value" of the leased equipment (R.Tr. 295-296). Ellison spent about four hours, no more, at the Raytheon plant where the equipment was located, on Saturday, January 13, 1962 (R.Tr. 279). On Monday, January 15th, Ellison advised Rheem orally and by letter that, in his opinion, *all* of the leased assets, on the loading dock (where Rheem was to receive them at the termination of the lease), were worth a minimum of $400,000 and a maximum of $500,000 (Exh. 1; R.Tr. 270-271, 274-275). His letter noted that certain of the assets in the nature of leasehold improvements would be worth substantially more to someone like Raytheon who had them in place (Exh. 1). At Rheem's request, Ellison on the following day, January 16th, furnished what he stated

[3]Kather apparently did not so understand it. He testified that Stroup told him Rheem was about to make an offer [to sell?] to *Raytheon,* but would withhold it if Kather was going to talk to Oesterle (R.Tr. 155-156, 179). The precise conversation is confused in the record, but is immaterial.

to be a "very fair price to Raytheon" for the leased assets (R.Tr. 282). In this statement, Ellison divided the items into two groups, one less marketable than the other (R.Tr. 284-285, 290, 502, 505). For the same assets which Ellison had included in his $400,000-to-$500,000 figure, he told Rheem that a fair price to Raytheon of the assets in place would be $638,960 (R.Tr. 285, 292). This total comprised two subtotals: one of $547,760 for certain items and the other of $91,200 for the rest—a segregation which Ellison testified at one point was "just pulled out of the air" (R.Tr. 286), and at another time explained that the smaller sum represented a "less merchandisable" group of items (R.Tr. 290).

On January 17, 1962, the day following receipt of the last-mentioned information from Ellison, Rheem delivered to Semiconductor a written offer to buy (subject to Raytheon's right of first refusal) the leased items, *excluding the $91,200 group,* for the "fair price to Raytheon" of $547,760 (Exh. 7). F. R. Grant, who was a vice president and director of Semiconductor and was also assistant controller of Rheem, had been alerted by Rheem's assistant general attorney that he "would be requested to sign on behalf of Rheem Semiconductor Corporation" (R.Tr. 419). Grant executed Semiconductor's acceptance of the offer the same day it was made (R.Tr. 423). He had not seen the "loading dock" appraisal when he accepted the offer of the parent company (R.Tr. 432-433). He did not know on what basis the price had been determined (R.Tr. 468-469). There was no price negotiation by either party, either for a higher price by the seller or for a lower price by the buyer (R.Tr. 429, 471-473).

The next day, January 18th, Semiconductor wrote Raytheon notifying it of the "offer" from its parent and of its acceptance subject to Raytheon's right of first refusal, and suggesting prompt advice as to Raytheon's election (Tr. 97). Raytheon received this notification on January 19th (R.Tr. 108). On January 23d, Raytheon wrote Semiconductor (Tr. 104), acknowledging receipt of the notice and advising that the notice was of no effect in that an offer by the parent could not be treated as a "bona fide offer," and secondly, in that it failed to specify the individual prices offered for each item of equipment. The letter further advised that any sale to Rheem on the basis of such notice would be regarded as a breach of the agreement and that Raytheon would hold Semiconductor accountable for all damages resulting therefrom.

A further development had yet to come. Semiconductor discovered that Ellison's appraisal included sales office furniture in locations throughout the United States and not in Mountain View (R.Tr. 425, 430). Grant telephoned Ellison, who told him to apply a two-thirds factor to the net book value of such items to compute the effect on his appraisal (R.Tr. 430). On January 26th, Rheem and its subsidiary rescinded the previous offer and acceptance and executed a new offer and acceptance at $531,584 (R.Tr. 428; Exh. 9). On the same day, Semiconductor wrote Raytheon notifying it of the new actions (Tr. 106-107). A letter from Semiconductor's president (who was also Rheem's president—R.Tr. 529) to Raytheon's general counsel followed, rejecting in advance Raytheon's anticipated denial of the validity of the new offer, recognizing Raytheon's right of first refusal until the close

of business on February 2, 1962, and closing with a definite threat (Tr. 109-110).[4]

On February 2, 1962, Raytheon wrote Semiconductor (Tr. 112-113):

> "Raytheon Company hereby notifies you that it unconditionally makes the election and exercises its rights pursuant to said Paragraph 12 to purchase the items of equipment listed on Exhibit 'A' attached hereto.
>
> It is necessary that the price of the items hereby purchased be determined. As you know, it is our position that no bona fide offer has been received by you for any of the items listed and that the price will be determined pursuant to other provisions of the agreement."

On February 6th, Semiconductor wrote Raytheon that its notice was not an exercise of its right of first refusal as against Rheem's offer, and that the latter and its acceptance by Semiconductor had resulted in a firm contract (Tr. 115-116). This lawsuit followed shortly.

Raytheon made two additional elections, one shortly before and one after the filing of the suit. (Exhs. D and E). Each was an election to purchase specified items re-

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[4] "We must further advise you that any action on your part whether in making any offer to buy assets under the Lease Agreement or otherwise, which would, if given effect, prevent the consummation of the sale to Rheem Manufacturing Company of the assets covered by its offer by assertion of your right to take title thereto at or before June 1, 1962 or otherwise, will be regarded by us as a denial of your obligation to make delivery of such assets upon expiration of the Lease and as a breach thereof. I am sure you understand that such a breach under Section 10 of the Lease unless remedied within thirty days after notice thereof, will among other rights, permit us to terminate the Lease, retain the rents theretofore paid and retake possession of all the leased assets."

maining in the "B" list after the first election—i.e., Ellison's "less marketable" items—and completed Raytheon's purchase of almost the entire "B" list.

SPECIFICATION OF ERRORS[5]

The Court below erred:

1. In ordering, adjudging, and decreeing that the offer from Rheem to Semiconductor to purchase certain assets then under lease from Semiconductor to Raytheon by virtue of the written lease dated November 30, 1961, was and is a bona fide offer (Judgment, par. 1);

2. In ordering, adjudging, and decreeing that the offer from Rheem to Semiconductor required Raytheon either to exercise its right of first refusal under paragraph 12 of the lease of November 30, 1961, or to forego its option (Judgment, par. 1);

3. In ordering, adjudging, and decreeing that the notice given by Raytheon to Semiconductor by letter of February 2, 1962, gave rise to a valid binding contract between Raytheon and Semiconductor whereby Raytheon became bound to buy certain leased assets for $531,584 rather than for their fair market value, and subject to credits and deductions, as provided in the contract of the parties (Judgment, par. 2);

4. In ordering, adjudging, and decreeing that should Raytheon and Semiconductor be unable to negotiate a mutually agreeable price for those assets which Raytheon

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[5]As in the body of this brief, "Rheem" is Rheem Manufacturing Company, "Semiconductor" is Rheem Semiconductor Corporation, and "Raytheon" is Raytheon Company.

had elected to purchase by letters of February 2, 1962 (Exh. D) and April 10, 1962 (Exh. E), the price shall be determined by an appraisal of the fair market value of the assets to Raytheon in the present location of the assets at the Mountain View plant as part of the operations of Raytheon (Judgment, par. 3);

5. In ordering, adjudging, and decreeing that the court reserves jurisdiction to resolve any further controversies that may arise in the application of the judgment, including the right to appoint an appraiser in lieu of American Appraisal Company in the event that it should appear that the American Appraisal Company is "disqualified" (Judgment, par 4);

6. In ordering, adjudging, and decreeing that Rheem and Semiconductor shall have and recover their costs of suit from Raytheon (Judgment, par. 5);

7. In finding, contrary to the evidence, that Rheem's offer to Semiconductor of January 26, 1962, as well as its prior but rescinded offer of January 17, 1962, was a bona fide offer (Finding No. 17);

8. In finding, contrary to the evidence, that there was no fraud or misrepresentation at any time on the part of Rheem or Semiconductor and no mistake on the part of anyone (Finding No. 18);

9. In finding, contrary to the evidence, that there is no room and no basis in the facts to disregard the corporate entity of Semiconductor or to treat it as an alter ego of Rheem (Finding No. 19);

10. In finding, contrary to the evidence, that refusal to disregard the separate corporate entity of Semicon-

ductor would not promote a fraud or work an injustice (Finding No. 20);

11. In finding, contrary to the evidence, that on January 12, 1962, Raytheon acquiesced that Rheem had a right to make an offer to Semiconductor for some of the leased assets (Finding No. 22);

12. In concluding that the offer from Rheem to Semiconductor was a bona fide offer and as such required Raytheon either to exercise its right of first refusal with respect to the items covered by the offer, or forego its option to purchase said items (Conclusion of Law No. 1);

13. In concluding that Raytheon's exercise of its right of first refusal gave rise to a valid binding contract between Raytheon and Semiconductor whereby Semiconductor became bound to sell and Raytheon became bound to buy the assets specified in Rheem's offer for the price of $531,584 payable by February 17, 1962, rather than for their fair market value, and subject to credits and deductions, as provided in the contract of the parties (Conclusion of Law No. 2);

14. In concluding that, as to leased items not included in the Rheem offer to Semiconductor but which Raytheon had elected to purchase under its option, should the parties be unable to negotiate a mutually agreeable price, the price shall be determined by appraisal, the value to be appraised being the fair market value of the assets to Raytheon in their present location as part of Raytheon's operations (Conclusion of Law No. 3);

15. In concluding that the Court reserves jurisdiction to appoint an appraiser in lieu of American Appraisal Company (Conclusion of Law No. 4);

16. In concluding that Rheem and Semiconductor are entitled to recover their costs (Conclusion of Law No. 5);

17. In failing to find that, in the event that Raytheon should acquire any or all of the leased items under its option or under its right of first refusal, all rentals paid by Raytheon are to be credited in full against the purchase price of items purchased (Plaintiff's Proposed Finding No. 15);

18. In failing to find that all of the relevant actions and policies of Semiconductor were controlled and dominated by Rheem and all individuals who acted in behalf of Semiconductor received their entire compensation from Rheem (Plaintiff's Proposed Finding No. 28);

19. In failing to find that the independent appraiser employed by Rheem reported that the value of the items which were included in the Rheem offer delivered on the loading dock of the Raytheon plant would range between a minimum of $292,624 (based upon prospective sale to a wholesaler) and $392,624 (based upon prospective sale to a local user) (Plaintiff's Proposed Finding No. 29);

20. In failing to find that the offer from Rheem and its acceptance by Semiconductor were not negotiated on a normal arm's length basis, that Rheem made no effort to purchase the items as cheaply as possible, and that there were no deliberations in the sense of negotiating or bargaining on behalf of Semiconductor (Plaintiff's Proposed Finding No. 30);

21. In failing to find that in the event Rheem does acquire the items which it seeks to purchase under its offer, its use therefore is limited to disposal at the best price it can get (Plaintiff's Proposed Finding No. 31);

22. In failing to find that one of the motives which actuated Rheem in making its offer to Semiconductor was to force Raytheon to select the items it wished to purchase prior to May 15, 1962 (Plaintiff's Proposed Finding No. 32);

23. In failing to find that another motive which actuated the offer from Rheem was to force Raytheon to forego its right of first refusal or purchase the items at a price determined by Rheem's appraisal (Plaintiff's Proposed Finding No. 33);

24. In refusing to admit testimony of H. R. Oldfield as to his knowledge of transactions consummated by Oesterle for Rheem. Defendant objected on the ground that the testimony concerned "deals unrelated to this transaction" (R.Tr. 121);

25. In refusing to admit a letter dated December 5, 1961, from Oesterle to Raytheon in which Oesterle confirmed the sale of various items of equipment to Raytheon. Defendant objected on the ground that "it [the letter] is irrelevant" (R.Tr. 147-148);

26. In refusing to allow E. N. Kather to testify as to what, if anything, Oesterle told Kather with regard to "whether you [Kather and Oesterle] were near, far apart, or on the nose," the question having reference to Raytheon's negotiations for purchase of the "B" list. Defendant objected to the question as leading (R.Tr. 152);

27. In refusing to admit the testimony of James Ellion relative to the effect of adjusting his appraisal of the loading dock value of the leased assets in order to reflect the fact that all of the leased assets were not included in Rheem's offer to Semiconductor. Defendant's objection

was that "The question is a distinctly argumentative question" (R.Tr. 292-294);

28. In admitting a letter dated January 10, 1962, from William Jochem to Charles Resnick in which Jochem set forth Rheem's interpretation of the basic contract provision permitting substitution of items from the "B" list into the "A" list. Counsel for plaintiff objected to admission of this letter on the grounds that it was "not concerned with the identification of A List items [but] concerned with the working out of an accounting with respect to them" and that the letter "has no relevance in this lawsuit" (R.Tr. 341-345; Exh. I);

29. In refusing to admit testimony of F. R. Grant regarding the economic effect of the amount of Rheem's offer upon its shareholders. Defendant objected to this testimony on the ground that it "is intruding upon the Court's function" (R.Tr. 437-438).

SUMMARY OF ARGUMENT

1. The "offer" from Rheem to Semiconductor to purchase most of the "B" list equipment for a price equal to the special value of the equipment to Raytheon, in place and as part of the latter's operations, was not a "bona fide offer" within the meaning and intent of the contract. The real and ulterior purpose was to destroy Raytheon's contract right to buy the items of its own selection at fair market value, and substitute a forced election to purchase a different selection of items at a price having no relation to market value. The facts that Rheem did not want the equipment for its own use, that

the offered price was far above the market value at which it could hope to resell the equipment to any other purchaser, and a multitude of other circumstances demonstrating the synthetic character of the entire offer-and-purchase transaction, prove beyond question that the offer was a flagrant attempt to subvert the operation of the contract.

2. Even if the offer were bona fide and Raytheon's election to purchase consequently obligated it to meet the offered price, the price to be paid would still be subject to credits and deductions as provided in the contract, rather than the fixed amount declared in the judgment.

3. "Fair market value", which is the standard of appraisal under the contract, means what the words mean in common understanding: value on the market to buyers generally and not acting under compulsion, rather than the special value to Raytheon of the equipment installed and integrated into the broader operations of Raytheon.

4. The stated reservation of jurisdiction to appoint an appraiser in lieu of American Appraisal Company violates the contract, has no basis in the record, and was beyond the jurisdiction of the court below.

ARGUMENT

FIRST: THE "OFFER" FROM RHEEM TO ITS WHOLLY OWNED AND CONTROLLED SUBSIDIARY WAS NOT A "BONA FIDE OFFER" WITHIN THE MEANING OF THE CONTRACT. IN THE ADMITTED CIRCUMSTANCES, THE ULTERIOR, REAL PURPOSE OF THE OFFER WAS TO SUBVERT THE INTENDED OPERATION OF THE CONTRACT BY DESTROYING RAYTHEON'S RIGHT TO BUY "B" LIST ITEMS OF ITS OWN SELECTION AT FAIR MARKET VALUE, AND SUBSTITUTE A FORCED ELECTION TO PURCHASE A DIFFERENT SELECTION OF ITEMS AT A PRICE FAR IN EXCESS OF MARKET VALUE. ABSENT A BONA FIDE OFFER, THE PRICE WHICH RAYTHEON BECAME OBLIGATED TO PAY FOLLOWING ITS ELECTION TO PURCHASE WAS NO MORE THAN THE FAIR MARKET VALUE TO BE APPRAISED AS SPECIFIED IN THE CONTRACT.

In the court below the issue of the bona fides of the Rheem offer was thoroughly confused by a plethora of argument over (a) whether the contract (and Raytheon) recognized the separate corporate entities of the Rheem parent and subsidiary to the extent that the contractual omission to prohibit a parent-subsidiary offer became a contractual sanction of such offer when made; and (b) whether bona fides hinged upon the readiness and ability of the offeror to complete the purchase when to do so would mean merely putting money from one pocket into another.

These are not points upon which the issue of bona fides in this case turns, but they effectively threw the case out of focus in the court below.

The essential point is that the Rheem offer here was not bona fide—either in the contemplation of the contract or in any real sense—in the light of two admitted and indisputable facts:

1. **Rheem did not want the equipment for itself;**

it was admittedly going out of the semiconductor business and its officers admitted that it had no use for the equipment; and

2. **The "offer" price was far above Rheem's own appraisal of the fair market value of the equipment to a third-party purchaser to whom Rheem might anticipate reselling it.**

Therefore there was, and could be, no motive or purpose in making the offer other than the ulterior purpose of an artificial price increase to Raytheon.

There is much else in the case (as we will relate in a moment) to establish the mala fides of the offer, but the two elements above are controlling.

Rheem did not want the equipment for its own use. Rheem was admittedly going out of the business of manufacturing and selling semiconductor devices (R.Tr. 205). Apart from vague suggestions that "it is possible" that some unknown portion of the items "might be useful" in some other division of Rheem (R.Tr. 480), it was conceded that neither Rheem nor any of its subsidiaries was any longer in the business of producing semiconductors (R.Tr. 24); Rheem did not have any use of its own for a complete line of semiconductor manufacturing equipment (R. Tr. 490-491); yet a "complete line" was what Rheem *purported* to be trying to keep together (R.Tr. 504-505; of this, more later). As to the unknown portion of the items which "might be useful" in some other Rheem division, there was not even any pretense of equating these with the list selected for inclusion in the offer. On the contrary, in the frantic haste of getting an "appraisal" and arranging an "offer" and "acceptance," the lines of

demarcation were left to the hired appraiser and one accountant (R.Tr. 505).

In short, in testing the *good faith* of the offer, there is nothing to connect the large list of items embraced therein with any prospective or even desired use by Rheem. In the context of good faith, the vague allusions to "possible" usefulness of unspecified items in other manufacturing operations are weightless. And so the question turns to the possibility of resale—which the Rheem witnesses asserted was the point of the offer.

The gist of their assertions was that (a) they had had some earlier negotiations with a Japanese concern (R.Tr. 212-213), (b) they had had an indication of "possible" interest" from the Stanford Research Institute (R.Tr. 217) and (c) there had been some "preliminary talk" about "using some of these assets in Greece" (R.Tr. 542). However, when Rheem made its "offer," no negotiations were being pursued (other than Kather's efforts on behalf of *Raytheon*) (R.Tr. 541-542); no outside offers had been received (R.Tr. 490); and there was no prospect in view for disposal of the list of items which Rheem selected (or had Ellison select for it) for purpose of making its offer.

Here again—in the context of good faith—Rheem defeats its own claim. For despite all the talk in the record about prior negotiations with the Japanese and prior inquiry from Stanford Research Institute, the final fact is that the "offer" price to Semiconductor (the special value to Raytheon, in place and operating) was so far above Rheem's own "fair market value" appraisal that there could have been no possible thought or hope of resale to others at such a price. Here are the figures:

Ellison's fair market value appraisal of the entire "B" list on the loading dock and ready for delivery (R.Tr. 270-271, 274-275; Exh. 1):

Value to a liquidator	Value to a purchaser for use
$ 400,000	$ 500,000

Adjusted to exclude the $91,200 worth of "less marketable" items not included in the offer:

–91,200[6]	–91,200[6]
$ 308,800	$ 408,800

Adjusted to exclude the items eliminated when the first offer and acceptance were rescinded and the second offer substituted:

–10,126[7]	–12,658[7]
$ 298,674	$ 396,142,

—compared to the Rheem offer of $531,584.

[6]The court found that the sum of $91,200 was Ellison's "dissembled, dismantled, removed" appraisal of these items (Tr. 63). Therefore this is the sum that is deductible from Ellison's oading dock appraisal figures for the entire "B" list, as in the text bove. When this was done in the lower court, however, defense ounsel objected that it was subtracting "apples from oranges" R.Tr. 293). If the $91,200 figure is looked upon as part of Ellion's second appraisal of $638,960 as the special value to Raytheon f the "B" list assets in place (supra, p. 12; and Exh. 2; R.Tr. 92-293), adjustment can be made by apportioning the $91,200 by ratio of $\frac{\$400,000}{\$638,960}$ in the first column and $\frac{\$500,000}{\$638,960}$ in the second olumn. Those ratios would correspondingly apply to the amounts eductible on account of the change between the first and second ffers (see footnote 7, below). Accordingly, the computations ould be as follows:

$ 400,000	$ 500,000
–57,093	–71,366
$ 342,907	$ 428,634
–10,126	–12,658
$ 332,781	$ 415,976

[7]The difference in the amount of the two offers was $16,176. o this the apportionment ratios shown in footnote 6 above are pplied.

Hence Rheem's offer of $531,584, by which Raytheon was supposed to be put to its option to either buy or forego, was from $135,000 to $233,000 more than Rheem's own appraised valuation of the items to any other purchaser. In the light of business reality, Rheem's pretense that it wanted to buy the items so as to preserve the possibility of reselling them at a huge loss simply does not hold water.

In short, as motive for making the extravagant offer to Semiconductor, all talk and argument about possible use by Rheem or possible resale was pure pretense. The only real motive for offering $531,584 was to put Raytheon to a sudden election—five days to decide whether to pay from $135,000 to $233,000 more than the value of the equipment on the open market or risk having it taken out of operation a few months hence. "Good faith" looks at real motives, not pretended ones.

All of this is not to say that, under appropriate circumstances a bona fide offer could not have come from Rheem. But for all that appeared here, giving full natural significance to every circumstance and event, no reason existed for Rheem to offer what it did for the equipment other than to create an artificial, coercive price to Raytheon far above what Raytheon would have to pay in the natural course of operation of the contract, together with an artificial, coercive selection of items without regard to Raytheon's rights of selection provided in the contract.

The essence of the agreement was, after first segregating the basically essential operating equipment (List "A") which Raytheon agreed to buy at 90 per cent of book value regardless of present market value, to give

Raytheon the right to select any or all of the remainder and buy it at fair market value. The Rheem offer and acceptance, with no prospect of use of the equipment and no possibility of resale except at a huge loss, were a bald attempt to subvert that contract right. In the light of Rheem's having signed an agreement to collaborate in the carrying out of the contract, this was far from an act of good faith.

The Rheem officials admitted that such was their purpose. Gordon Mallatratt, vice president and director of Rheem (and treasurer of Semiconductor), stated (R.Tr. 223):

> "A Our apprehension was in the area that they might well take certain testing equipment and certain other key equipment that would break up the desirability of the remaining assets so that it could not be used for investment abroad or elsewhere as a line and for sale as a line; that we could not maximize the return to our company, and we were interested in the long run in maximizing the return.
>
> "Q You were interested, then, in having Raytheon, regardless of what its rights may have been, to buy all of this stuff or none of it; wasn't that part of the problem?
>
> "A Yes, that certainly was part of it."

nd A. Lightfoot Walker, president of both Rheem and emiconductor, said the same thing (R.Tr. 539):

> "Q Mr. Walker, what was the business purpose motivating Rheem Manufacturing in making these offers we have been discussing to purchase certain of the assets which had been leased by Rheem Semiconductor to Raytheon Company?

"A We wished to generate the maximum value out of the remaining assets."

While the foregoing essentially establishes a mala fide purpose to subvert the natural operation of the contract rather than a bona fide purpose within the intent of the contract, other surrounding circumstances add a damning array of corroboration. Individually they are persuasive; collectively they are overwhelming:

No negotiations between Rheem and Semiconductor preceded the offer or its acceptance.

(R.Tr. 424-425, 471-472, 536-537). The nearest thing to "working up a deal" between the parties was that:

Rheem "alerted" Grant to sign Semiconductor's acceptance.

All that Grant—vice president and a director of Semiconductor—knew was that Rheem was thinking of making an offer for certain of the leased assets and that he would be requested to sign on behalf of Semiconductor (R.Tr. 419); and then that Ellison was being requested to make an appraisal of these assets and would develop a fair market value which would become the amount of the offer (R.Tr. 419-420). Grant, like the other officers of Semiconductor, received his compensation from Rheem (R.Tr. 530).

Semiconductor held no directors' meeting to discuss the offer or its acceptance,

(R.Tr. 425), although the offer embraced practically all the assets which Semiconductor still owned in Mountain View. Obviously the "request" to Grant was enough.

Semiconductor made no efforts to obtain a higher price,

either from a third party (R.Tr. 231), or from Rheem (R.Tr. 425).

Conversely Rheem did nothing toward obtaining a lower price, (R.Tr. 429), which it reasonably could have done on the basis of its own fair market value appraisal—the first appraisal which Ellison made.

Grant signed Semiconductor's acceptance the day the offer was made.

The offer was made January 17; Grant signed acceptance the same day (R.Tr. 423, 476). He was obviously not expected to do anything else.

Semiconductor, before accepting the offer, took no time to ascertain whether the appraisal was fair or accurate, or whether the items listed in the offer were available for sale.

In fact, the appraisal was inaccurate, as events proved. Though Ellison was sent to appraise the equipment at Mountain View, his list and values included equipment unconnected with the manufacturing operation and scattered throughout the country. Grant had not seen Ellison's first appraisal; his earliest knowledge of what was appraised had to come from the second appraisal on January 16 (R.Tr. 431-433); but he dutifully accepted the offer the very next day.

On discovering that the first offer and acceptance included assets in which Raytheon would have no interest, the Rheem companies made precipitate haste to wipe out that transaction entirely and set up a new transaction aimed at Raytheon alone.

Had the Rheem offer been an honest effort to acquire assets, there is no reason why it should not have stood up regardless of including equipment at locations other than Mountain View. A price could readily have been set for the Mountain View assets. But when Semiconductor discovered that other assets were included, in which Ray-

theon had expressed no interest, in great haste the first transaction was rescinded entirely, and a substituted transaction aimed at Raytheon alone.

The second offer, like the first, was accepted the day it was made.

(R.Tr. 428). Despite the experience with the first offer, no time was taken to double check.

Semiconductor held no directors' meeting to discuss acceptance of the second offer, or even rescission as to the first.

The original pattern still held (R.Tr. 428).

The offer-and-acceptance timetable was one of unnatural haste though Rheem had no prospect of use for the equipment, no third-party negotiations were pending, and no third-party offers had been received.

Rheem was out of the semiconductor business (R.Tr. 224). It had no use for the equipment for semiconductor manufacturing (R.Tr. 490-491). No offers from third parties to buy any of the equipment had been received (R.Tr. 490). While in the court below the defendants sought to make much of their prior Japanese negotiations and other "preliminary talk" (supra, p. 24), the evidence was undisputed that no active negotiations were then going on with anyone other than Raytheon (R.Tr. 541-542). Even more significantly, *after* Rheem claimed to have bought the property and rejected Raytheon's exercise of its option, the outside "negotiations" were not carried any further (R.Tr. 541). In the light of all the circumstances, reference to such negotiations as a motive or purpose for the Rheem offer was nothing more than smoke-screen.

Rheem hired Ellison January 12; Ellison made his appraisal of everal thousand items in four hours on January 13; he made n oral as well as a written report on Monday, January 15; on equest he furnished a different appraisal of the "value to Ray-heon" on January 16; Rheem's offer was made on January 17 nd accepted the same day.

Without any pending or even any reasonably imminent ffer from an outside purchaser, there was no necessity or the rapid-fire sequence of events in fashioning an ffer and acceptance. Nevertheless, by Ellison's admis-ion, it was "a very hurried situation" (R.Tr. 297). The our-hour appraisal, the hasty direction to change the ppraisal from a fair-market-value standard to a fair-alue-to-Raytheon-in-place standard and its overnight ccomplishment, and the consummation of both offer and cceptance the very next day, show beyond question the ngle purpose of forcing upon Raytheon a price and election of items wholly at odds with the expressed cheme of the contract.

Though Rheem claimed that a purpose of its offer was to pick t full lines of equipment, Ellison was not told to pick out or parately appraise items to build up a full line.

While Rheem claimed that one of the purposes of the ffer was to pick out full lines of equipment for easier sale (R.Tr. 223), the overt action—the way the offer as fabricated—was not in accord. Apart from the fact at the offer price was the appraised value in place to aytheon rather than a possible resale value, it was Elli-on, the four-hour appraiser, who was left (with the help Rheem's accountant Oesterle) with the entire task of lecting the items to be embraced within the offer. Ellison as *not* told to pick out, or separately appraise, items

which would build up a full line (R.Tr. 287). The action are more revealing than the assertions.

In fact, no production lines could be built up from the "B list items.

The only testimony on this point—and it was uncontra dicted—was that of Frank M. Breene, operations mar ager at Mountain View—an electrical engineer and on of the "Baldwin Group." Defendant's counsel expresse no doubt that Mr. Breene was fully qualified as to whethe a full line of equipment could be gotten out of the dea or not (R.Tr. 314-315). Mr. Breene testified flatly that n full production line for producing any given model c semiconductor device could be built up from the "B list (R.Tr. 313-314). As for the three types of semicon ductor devices manufactured at Mountain View, the "B list would supply only a fraction of a full production lir for any of them: for a diffused diode line, perhaps 1 per cent; for a diffused transistor line, perhaps 30 t 35 per cent; and for an alloy diode line, perhaps 60 pe cent toward making up a line of even very limited volun capability (R.Tr. 317). This uncontradicted fact, couple with the way Semiconductor went about the matter wi Ellison (supra, p. 31), shows that the talk of preservir full production lines was empty of truth or sincerity.

Rheem made its offer at a price far exceeding fair value the market, knowing that it made no economic difference Rheem shareholders what amount it paid to Semiconductor.

Rheem's president—the man who authorized the off and Semiconductor's acceptance (R.Tr. 538)—admitt that it would make no economic difference to the shar holders of Rheem what amount Rheem paid to Sen

conductor for the assets (R.Tr. 548-549). Here Mr. Walker merely expressed what he obviously knew all along: that with 99.9 per cent ownership of the subsidiary, intercorporate payments could not change the interests of the shareholders who in practical effect owned both corporations.

If Rheem wanted to acquire the assets pursuant to its offer, it had to take them on the loading dock; and its loading dock appraisal was far less than the amount of the offer.

Section 5 of the lease required Raytheon to deliver all of the leased property which it should not have purchased, to Semiconductor at the loading docks of the Mountain View plant in condition for removal (Tr. 54). Ellison's loading dock appraisal for the items included in the offer was in the order of $333,000 as value to a liquidator and $416,000 as value to a prospective purchaser for its own use (supra, p. 25). The offer price of $531,584 had no relation to the loading-dock price.

Semiconductor gave its parent, Rheem, a gratuitous indemnity against loss if it could be legally established that Raytheon had exercised its right to purchase the property specified in Rheem's offer.

As though the circumstances pervading the offer and acceptance were not enough to show their synthetic character, still another confirming circumstance was yet to appear. The offer and acceptance were executed on January 26. Raytheon gave notice of exercise of its right of purchase on February 2. On February 6 Semiconductor wrote to its parent a letter (Exh. 14) reciting Raytheon's "purported election" and its own rejection of the same, and adding:

> "In the event, however, it is established by Raytheon Company in any appropriate legal proceeding that it has effectively exercised its right to purchase such property, we will reimburse you for any loss which you might sustain by reason thereof."

This gratuitous indemnity by the wholly owned and controlled subsidiary rounds out the aspect of fabrication which permeated the offer and acceptance from the beginning.

Rheem's action was an everything-to-gain-nothing-to-lose gamble. If it worked, Rheem forced Raytheon to pay an artificially inflated price; if it failed, Rheem simply transferred the money from one pocket to another and then back again.

Obviously Rheem had nothing to lose by making its offer. If the action should stand up in court, Raytheon was coerced into buying a group of assets, some of which it might not otherwise elect to buy, and all at a price well above their value on the open market, and at no risk of loss to Rheem (see above). If the device failed, Rheem merely paid the price to its subsidiary, which would then repay it to Rheem in satisfaction of intercorporate indebtedness (R.Tr. 481)—a transfer from one pocket to another and then back again.

In practical effect as well as in economic effect, Rheem would then be no worse off. It could undo the intercorporate transaction as readily as it put it together (and then undid it and put it together again) in the first instance. Presumably the negotiations between Raytheon's Kather and Semiconductor's Oesterle, looking toward a mutually agreed price, could pick up again. O

heem could still sell the equipment to third parties if it ould desire.

Taken together,[8] all these facts and circumstances veal the "offer" for what it truly was—a device for e *sole* purpose of coercing Raytheon into a situation ite the reverse of the natural scheme provided for in e agreement. No other purpose stands critical examation as anything more than pretense.

The pattern of rights set up by the contract was clearct in essence and purpose. Raytheon had agreed to and d pay $923,800 for the leasehold improvements and a rge portion of the manufacturing equipment items on te 90 per cent of book value basis, regardless of current arket value, and $1,100,000 for the inventory. Beyond tis, Raytheon wanted—and received as part of the bargin—the right to select what other items it should eventally purchase, as time and practical experience would veal. Raytheon had just bought much equipment from olumbia Broadcasting System; it did not want unnecesary duplication (R.Tr. 100). The seller was protected a to price: an independent appraisal of fair market value. was protected against losing the benefit of a *bona fide* tter offer. But otherwise the selection was Raytheon's, s far as the "B" list was concerned. This was what the heem offer attempted to subvert. It had no other real rpose.

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[8] "A state of mind such as good faith is not determined by a conseration of events viewed separately. The picture is created by a onsideration of all the facts viewed as an integrated whole. [Citations]"

—*National Labor Relations Bd. v. Stanislaus Imp. & H. Co.* (9 Cir. 1955) 226 F.2d 377, 381.

The foregoing makes it clear that the distractions belo —whether Rheem was recognized by the parties as a se arate entity so as to be capable of an offer under th contract, and whether Rheem intended to go through wit the purchase if Raytheon should not exercise its optic —are not the real issues at all. What is in issue is n *who* makes the offer, but whether it is made in goc faith, whoever the offeror might be. And whether Rhee was prepared to take the consequences if the gamb should fail is not controlling on the question of the goc faith on the one hand, or ulterior purpose on the othe which motivated the offer. As above shown, performan of the offer was for Rheem a matter of form only, n of substance.

"Bona fide" must have real meaning. It was not p into the contract to provide a cover for technical device An offer empty of intent to perform, whether from th parent corporation or an outsider, would be no offer at all and would not arrest the course of operation und the contract in any event. Standing alone, the wo "offer" implies intent to perform. Mere intent to car out the stated object "is not, of itself, equivalent to go faith" (*Janise v. Bryan* (1948) 89 Cal.App.2d Supp. 9 937, 201 P.2d 466, 469).

Hence "bona fide"—"in good faith"—means somethi more. As early as 1796, the Supreme Court of the Unit States said "*Bona fide* is a legal technical expression; a the law of Great Britain and this country has annex a certain idea to it. It * * * signifies a thing done real with a good faith, without fraud or deceit, or collusion trust" (*Ware v. Hylton* (1796) 3 Dall. 199, 241).

Judge Learned Hand pronounced a memorable definition in *National Labor Relations Bd. v. James Thompson Co.* (2 Cir. 1953) 208 F.2d 743, 745:

> "'Good faith' is one form of credibility; it means that the motive that actuated the conduct in question was in fact what the actor ascribes to it: i.e. that what he gives as his motive was in truth his motive."

Elsewhere it is stated that "good faith" turns upon the actuating motive:

Staves v. Johnson (D.C.Mun.App. 1945) 44 Atl.2d 870, 871;

Janise v. Bryan (1948) 89 Cal.App.2d Supp. 933, 937, 201 P.2d 466, 469, quoting *Staves,* supra;

not upon the formal fact, but upon the "prime motive," the "dominant purpose":

Dargel v. Barr (Em.App. 1953) 204 F.2d 697, 699;

McSweeney v. Wilson (D.C.Mun.App. 1946) 48 Atl. 2d 469, 471;

Staves v. Johnson (D.C.Mun.App. 1945) 44 Atl.2d 870, 871;

Snyder v. Reshenk (1944) 131 Conn. 252, 38 Atl.2d 803, 807 ("the motive and purpose with which the plaintiff acted * * * were determinative of her 'good faith' ");

Gibson v. Corbett (1948) 87 Cal.App.2d Supp. 926, 932, 200 P.2d 216, 220.

Good faith does not live where an ulterior motive or reason exists:

Ogle v. Hubbel (1905) 1 Cal.App. 357, 365, 82 Pac. 217, 220-221 (holding ineffective a high-priced

sale to a relative where the real motive was t
discourage a lessee's exercise of his right of fir
refusal);

Staves v. Johnson, supra, 44 Atl.2d 870, 871;

Gibson v. Corbett, supra, 87 Cal.App.2d Supp. 92
932, 200 P.2d 216, 220.

"Good faith" demands "honesty of purpose,"

Woolley v. Standard Oil Company of Texas (5 Ci
1956) 230 F.2d 97, 104;

Kam Koon Wan v. E. E. Black, Limited (D.Hav
1948) 75 F.Supp. 553, 561;

In re Vater (E.D. Ky. 1936) 14 F.Supp. 631, 632,

"An unpretending, sincere intention,"

National Labor Relations Bd. v. Stanislaus Imp.
H. Co. (9 Cir. 1955) 226 F.2d 377, 380,

"being faithful to one's duty or obligation,"

Gibson v. Corbett, supra, 87 Cal.App.2d Supp. 92
932, 200 P.2d 216, 220,

adhering to "the spirit as well as the letter,"

Gibson v. Corbett, same,

and "evidenced by such candor and frankness in recog
nizing such obligations as reflect sincerity and willing
ness to perform them,"

In re Vater, supra, 14 F.Supp. 631, 632.

As said above, actual performance is not the tes
Whether the sale to another was actual (i.e., where tit
passed and the money was paid over) is not the tru
question, where the real design was to cut off the lessee
rights—"a mere contrivance" satisfying the form but n
the spirit of the agreement (*Muzzy and Wells v. Alle*
(1856) 25 N.J.Law 471).

"To limit the meaning to mere physical operation would be to eliminate 'bona fide.' "

—*McDonald v. Thompson* (1938) 305 U.S. 263, 266.

In the light of these precepts, the Rheem offer was anything but bona fide. It was collusive without a doubt. The stated motives of possible use of "some" of the items elsewhere and of protecting resale value of the equipment, in the face of Rheem's admitted abandonment of the semiconductor business and the huge discrepancy between the offer price and the resale value, were sheer pretense. The ulterior and real motive—the actuating motive—blatantly evident in all the circumstances was to put Raytheon in a coercive position where it would either have to buy the list *selected by Rheem* at a price far exceeding Rheem's value either for use or for resale, or risk losing the equipment *and* the credit value, against purchase price, of $250,000 rent.

Far from being faithful to the spirit and intent of the obligation to which it had subscribed its name, Rheem itself contrived a device to take away Raytheon's agreed right of selection and force a higher price. Candor and sincerity were conspicuously absent.

Completion of the purchase and payment of the money by Rheem mean nothing in this context. At most, Semiconductor would return it forthwith to the parent in repayment of intercorporate indebtedness (R.Tr. 481). Further, even before the money was paid in fulfillment of this supposedly bona fide transaction, Semiconductor gave its parent a gratuitous undertaking to reimburse the latter for any loss which it might sustain if Ray-

theon's exercise of its right to purchase should be legall established (Exh. 14; R.Tr. 435). And, most significa of all, payment of the money from one corporate pock into another made no possible economic difference to t shareholder-owners of Rheem (R.Tr. 548-549).

However it may be that the separate corporate entiti of the Rheem companies might have permitted a paren subsidiary offer for a bona fide objective distinct fro meddling in the contract, in this case Rheem made its su sidiary a mere puppet, used the forms of an interco porate transaction to cover an objective aimed solely Raytheon's contract rights, and abused the power of i dominant position in an attempt to upset the natur operation of the contract.

Taking into consideration all the true circumstanc the trial court's finding and judgment declaring that t Rheem offer was a bona fide offer are clearly erroneo and should be set aside.

SECOND: IN ADDITION TO THE ERROR IN SETTING RA THEON'S PURCHASE PRICE FOR THE EQUIPMENT SPE FIED IN THE "OFFER" AT THE "OFFER" PRICE, TI JUDGMENT ALSO ERRED IN DESIGNATING THE PRICE BE PAID AS $531,584 WITHOUT DEDUCTION OR OFFS FOR THE RENTALS PAID OR FOR UNDELIVERABLE ITE AS SPECIFICALLY PROVIDED IN THE CONTRACT.

We believe there is no dispute on this point. The c tract clearly provides that the rents paid and to be p shall be credited against and applied toward the purch price of the leased items purchased by Raytheon (Tr. supra, p. 9). Since the judgment states unqualifie

hat the amount payable by Raytheon for the assets in uestion is $531,584 (Tr. 166), we are obliged to point it t as error, although it is understood that the appellees o not contend that the contract provision for crediting ie rentals paid should not be applied.

Incidentally, the judgment also erred in failing to pro- de for reduction of the amount of the purchase price r any assets which should prove to be undeliverable. aytheon's right of first refusal was the right to pur- ase "at the price or prices * * * specified in such offer" Tr. 57). Rheem's "offer" to Semiconductor stated in rms that the price specified ($531,584) would be reduced y 90 per cent of the book value of any assets which were t deliverable (Tr. 106; Exh. 9). The judgment fails to alify the purchase price accordingly.

HIRD: THE "FAIR MARKET VALUE" WHICH IS THE STANDARD OF APPRAISAL UNDER THE CONTRACT IS VALUE ON THE MARKET, NOT THE PECULIAR VALUE TO RAYTHEON AS OWNER AND OPERATOR OF THE PLANT WHERE THE EQUIPMENT IS AT THE MOMENT INSTALLED AND WORKING. THEREFORE (A) AS TO THE ITEMS WHICH RAYTHEON ELECTED TO PURCHASE BY EXHIBITS D AND E, THE JUDGMENT (PARAGRAPH 3) MUST BE CORRECTED SO AS TO DIRECT THE PROPER RATHER THAN AN IMPROPER STANDARD OF APPRAISAL, AND (B) IN CORRECTING THE JUDGMENT AS TO THE "OFFER" ITEMS, THE PROPER STANDARD OF APPRAISAL SHOULD BE RECOGNIZED.

The lease (section 12, quoted supra, pp. 7-9) specifi- lly gave Raytheon the option to buy "B" list items its selection (subject to prior bona fide offers and its

right of first refusal as to them) for a price determin as follows:

1. Mutual agreement, or
2. Failing agreement, the lower of:
   (a) 90 per cent of book value, or
   (b) their fair market value as determined American Appraisal Company.

The "fair market value" provision is pertinent in t ways: (1) If the Rheem offer and purported sale Raytheon are determined to have been not bona fide, above shown, then the price to be paid by Raytheon[9] is be determined according to the contract provision abo summarized, and (2) the price for the other items, whi Raytheon elected to purchase by its letters of February and April 10, 1962 (Exhs. D and E), will also be det mined by this contract formula.

The controversy has been as to whether the "fair m ket value" means the value of the selected items d mounted and ready for bids by any and all prospect purchasers, or whether it means the value of the items Raytheon in place, installed, and in operation.

[9]All references herein to the price to be paid by Raytheon deemed to be subject to credit for rents paid, as provided in contract.

The common, well-understood meaning of "fair market value" is value on the open market—the price which a hypothetical buyer free of compulsion would pay for, and for which a hypothetical willing seller likewise free of compulsion would sell, the property in question. It excludes the effect of circumstances peculiar to either buyer or seller.

At the outset, we respectfully submit, the question answers itself. "Market value" means value on the market,

"worth to persons generally, purchasing in the open market * * *"

—*Sacramento etc. R.R. Co. v. Heilbron* (1909) 156 Cal. 408, 412, 104 Pac. 979, 981;

the highest price which the property

"would bring if exposed for sale in the open market"

—*Id.*, 156 Cal. at 409, 104 Pac. at 980.

is a common, well-understood expression,

"so often judicially defined as the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell."

—*Elmhurst Cemetery Co. v. Comm'r* (1937) 300 U.S. 37, 39.

It is not the value to a particular buyer or seller but value to buyers and sellers generally, which is the test. It

"must be determined, in the last analysis, by the 'rule of common estimation'."

—*Joint Highway Dist. No. 9 v. Railroad Co.* (1933) 128 Cal.App. 743, 755, 18 P.2d 413, 418.

"The test of market value is objective. It is what a hypothetical willing seller would part with the land

> for and what an equally hypothetical buyer wou
> give for it."
>
> —*Baetjer v. United States* (1 Cir. 1944) 143 F.
> 391, 396.

Hence the term automatically excludes any peculi
value which the items in question might have to o
buyer alone, i.e., the owner or operator of the plant
which they happen to be installed.

If the "B" list items in question were placed on
market for sale, they would have to be dismounted a
available for open market buyers. Willing, uncoerc
buyers would not pay the added costs of planning,
gineering, installation, and co-ordinated operation wh
entered into the special value of the items in place and
operation. It is not as though the whole plant were be
sold or valued for sale. To have a market value *for*
particular items of equipment, not the whole plant,
items must be available to any willing buyer. To det
mine such a market value, the particular items m
necessarily be considered out of, and apart from,
plant in which they happen to be installed and operat
at the moment.

In other words, it is the market value of *what*
seller has to sell, that is determinative. The decision
this Court in *Southern California Fisherman's Ass'n*
United States (9 Cir. 1949) 174 F.2d 739, illuminates
the point. There the United States condemned land
which certain improvements stood. The land was ow
by the City of Los Angeles; the improvements were m
tained under city permits revocable on 30 days' no

The owners of the improvements claimed recompense based upon the value of the improvements attached to the land. This Court affirmed a judgment limiting their compensation to the removed value of the improvements, on the basis that their market value—i.e., what a willing buyer would have paid in cash to a willing seller—was no more than the value of the improvements subject to removal notice, and that amount would place the owners in as good a pecuniary position as before. The Court held that the Government was not required to pay the enhanced value by reason of the attachment to the realty.

So here, Semiconductor could not offer for sale upon the market anything more than the equipment dismounted and on the loading dock. Raytheon was not obligated to return to Semiconductor, at the termination of the lease, any more than that. Value to Raytheon, in place and as part of its operations, was not something which Semiconductor could offer for sale upon the market and had no market value in the intent of the contract.

The rule excluding elements of special fitness or adaptability to the uses of one party or the other is well established *(United States v. Miller* (1943) 317 U.S. 369, 375). As said in *United States v. Petty Motor Co.* (1946) 327 U.S. 372, 377, " 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property * * *." The recognized definitions of market value are epitomized in the statement from *Miller v. Commonwealth* (1935) 291 Mass. 343, 197 N.E. 781:

"That value means the price that can be obtained under fair conditions as between a willing buyer and

a willing seller when neither is acting under necessi
compulsion, or peculiar and special circumstance

In short, special value to the buyer is no element of f
market value. The value to Raytheon of the "B" l
items is a false criterion.

2. "Market value" does not mean "value in use."

The courts have so stated again and again.

"The distinction between value in use and value
exchange or market value has been generally rec
nized by the courts * * * [citing many authorities]"

—*Joint Highway Dist. No. 9 v. Railroad Co.* (19
128 Cal.App. 743, 753, 18 P.2d 413, 417.

"Value in use to the owner is not a criterion
[market] value. Nor is value in use to the per
who seeks to acquire the property."

—*In Re Alberti* (S.D.Cal. 1941) 41 F.Supp. 380, 3

"This case * * * reasserts the principle that m
ket value is not the value in use or the value to
buyer."

—*Id.*, 41 F.Supp. at 383.[10]

**3. The scheme of the contract distinguished installed value f
"fair market value" of the selected items.**

The market value formula for the "B" list items
nally contrasts with the installed cost formula for
"A" list. Raytheon paid more than $2,000,000 for

[10]While a number of the cases declaring the principle are
demnation cases, *In Re Alberti* points out that they all deal
the essential question of market value and that the principle
general one.

lsehold and appurtenances, the inventory, and the items o equipment initially considered to be basically essential tothe operation of the plant—the "A" list. For the "A" li items it agreed to pay and did pay 90 per cent of bok value—which includes installed costs. But as to the "," list items—those which were initially thought to be o questionable value in the operation or possibly to dplicate other equipment which Raytheon already owned Raytheon agreed to buy only those items which it ght later select and to pay not more than fair market ue as determined by a designated independent appliser.

The "value to Raytheon" includes elements of compulsion which contrast with the essential nature and recognized meaning of "fair market value."

he "value to Raytheon, in place and in operation" y well include some amount which Raytheon peculiarly uld feel compelled to pay in order to avoid the losses costs of replacing the specific items in its operation. y such amount, over and above the amount which a iing buyer on the open market would agree to pay, is "fair market value." Compulsive circumstances are part of this standard. This court said in *In Re Williams' Estate* (9 Cir. 1958) 256 F.2d 217, 218:

"By definition, fair market value means the price at which a willing buyer and a willing seller would arrive, after negotiation for sale, where neither is acting under compulsion."

s not "a value obtained from the necessity of the r to sell or the purchaser to buy" *(Weed v. Lyons eroleum Co.* (D.Del. 1923) 294 Fed. 725, 734).

5. "Fair market value," to be useful as a standard, must objective.

The virtue of "fair market value" as a standard valuation is that it is objective *(Baetjer v. United Sta* supra, 143 F.2d 391, 396). Contracting parties may us with reasonable anticipation of the results. Special va of an article in the hands of one of the parties is objective, and no safe measure for contracting purpo

6. If the parties had intended a standard of value to Rayth in place, they should and would have said so in the contr

Of course, if the parties had meant something ot than value on the open market—specifically, value to R theon in place and in operation—they would have saic in the contract. It would have been a simple matter add the qualifying words if they had been intended even contemplated. By omitting to do so, the parties m clear their intention to use the phrase in its commo understood sense of value on the open market.

The well-settled rule is that the ordinary meaning contractual words prevails, unless it is made clearly appear that *both* parties understood that they were u in a different sense,

Minneapolis-Moline Company v. United States Cl. 1957) 149 F.Supp. 146, 148;

and if something other than the common or usual m ing is intended, it is "incumbent upon the parties volved to make the distinction in the instrument."

Reliance Life Ins. Co. v. Jaffe (1953) 121 Cal. 2d 241, 245, 263 P.2d 82, 85.

Practical interpretation of the contract by the Rheem people confirms the ordinary standard of fair market value, rather than special value to Raytheon.

The circumstances of the Ellison appraisal are illuminating as a practical interpretation of the contract by the Rheem people themselves. Ellison's instructions were to make a fair market value appraisal of all the "B" list items (R.Tr. 372). To leave no doubt as to what he was supposed to do, the contract provision was read to him (R.Tr. 372-373). Ellison responded with his "loading dock appraisal" of from $400,000, which a liquidator would be willing to pay, to $500,000, which a prospective user would be willing to pay (R.Tr. 274-275). Ellison added that the items would have a different value if they were maintained in place (Exh. 1).

Rheem obviously did not like the result. Instructions were hastily given to Ellison to produce another appraisal, pursuant to which Ellison developed an "amount which should be offered to Raytheon as a purchaser of these goods" (R.Tr. 284, 494). Then, without saying anything to Raytheon about the results of Ellison's real market value determination, Rheem made its first offer and Semiconductor its first acceptance, and notified Raytheon that it had five days within which to act.

It was not until Rheem found itself disappointed with the results of the "fair market value" appraisal which it had ordered, that it told Ellison to apply different standards.

Another instance of Rheem's conduct is enlightening. When Raytheon undertook to negotiate a price for the entire "B" list in pursuance of the "mutual agreement"

provision of the contract (the Kather—Oesterle negot-
tions, supra, pp. 10-11), Stroup told Kather that he co
not carry on such discussions unless Raytheon wo
waive its right of appraisal (R.Tr. 155-156). This
willingness to negotiate while the right of fair mar
value appraisal was outstanding means just one thi
Recognizing that fair market value carried its norm
meaning of price on the open market, available to buy
generally, the Rheem people were no longer willing
fulfill their contract to accept that price.

All the indicia—normal meaning of the words, c
sideration of other elements of the contract, practi
operation of the contract and conduct of the partie
confirm the contractual understanding that "fair mar
value" means the intrinsic saleable value of the ite
themselves, and not their special value-in-use as part
the broader operations of Raytheon.

FOURTH: THE PROVISION IN THE JUDGMENT RESERVING JURISDICTION TO APPOINT AN APPRAISER IN LIEU OF AMERICAN APPRAISAL COMPANY IF "DISQUALIFIED" HAS NO WARRANT OR BASIS EITHER IN THE AGREEMENT OF THE PARTIES OR ANY EVIDENCE IN THE CASE, AND SHOULD BE STRICKEN.

By the terms of the contract, the parties agreed to abide by the "fair market value" appraisal of American Appraisal Company, as determinative of the price of Lot "B" items which Raytheon should elect to purchase (other than pursuant to its right of first refusal of items covered by a bona fide offer) (Tr. 57-58). Nothing in the record challenges this agreement in any way. Nevertheless, without any evidence or any other warrant for the action, the trial court accepted defense counsel's draft of the judgment (not approved by plaintiff's counsel (Rule 21 of the Local Rules of Court) (Tr. 168)) with the provision for appointment of a different appraiser if American Appraisal Company should appear "disqualified." But there is nothing in the agreement of the parties to indicate that American Appraisal Company should be disqualified either in the event hypothesized by the judgment or in any other particular event. Remaking the contract in this regard was not within the issues of the case, and the trial court had no power to presume to do so.

A judgment which goes outside the issues raised in the record is pro tanto invalid,

J. P. Jorgenson Co. v. Rapp (9 Cir. 1907) 157 Fed. 732, 738-739;

and a court without jurisdiction to determine particular issues at the trial is without jurisdiction to reserve such issues for future determination.

Osage Oil & Refining Co. v. Continental Oil Co. (10 Cir. 1929) 34 F.2d 585, 588.

CONCLUSION

For the foregoing reasons, we respectfully submit t
the parts of the judgment from which Raytheon appe
should be reversed; in other respects it should be affirm

Dated: December 10, 1962.

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and Cross-appellee.

I certify that, in connection with the preparatio
this brief, I have examined Rules 18 and 19 of the Un
States Court of Appeals for the Ninth Circuit, and t
in my opinion, the foregoing brief is in full compli
with those rules.

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Attorney for Appellant
and Cross-appellee.

(Appendix Follows)

Appendix.

Appendix

LIST OF EXHIBITS

(Pursuant to Rule 18, 2(f))

laintiff's Exhibits	Identified	Offered	Received or ("x") Rejected
1	55	54	55
2	55	54	55
3	71	71	71
4	148	148	148—x
4-A	230	230	230
5	184	183	184—x
6	232	232	232
7	81	80	81
8	219	218	219
9	225	225	225
10	324	324	324
11	327	325	327—x
12	382	380	382—x
13	407	407	407
14	436	436	436
15	440	440	440
16	558	557	559—x
17	560	560	560

Defendant's Exhibits	Identified	Offered	Received or ("x") Rejected
A	82		
B	117	328	328
C	157	330	331
D	166	166	166
E	167	167	167
F	176	183	184—x
G	334		
H	337	337	337
I	340	342	345
J	346	347	347
K	349	349	349
L	377	377	377
M	447	445	447
N	452	452	452
O	454	453	454
P	458	455	458—x
Q	459	458	459—x